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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARTURO TORREZ ARRIAGA Defendant and Appellant.	E032320 (Super.Ct.No. FSB31412) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Phillip M. Morris, Judge. Affirmed.

William R. Salisbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Arturo Torrez Arriaga guilty of forcible rape (count 1),[1] corporal injury upon a cohabitant, which resulted in a traumatic condition (count 2),[2] criminal threats (count 3),[3] misdemeanor false imprisonment (count 4),[4] arson of another's property (count 5),[5] and vandalism (count 6).[6] The jury also found true the allegation that defendant used a deadly weapon in the commission of the rape.[7] The court sentenced defendant to an indeterminate prison term of 15 years to life for the rape conviction. Consecutive to the indeterminate term, the court sentenced defendant to a determinate term of six years for the remaining counts, as follows: four years for the corporal injury conviction, eight months for the criminal threats conviction, eight months for the arson conviction, and eight months for the vandalism conviction.[8]

On appeal, defendant contends: (1) the trial court improperly allowed the prosecution to show numerous photographs of the victim's injuries, several times to the jury; (2) the six-year term that was imposed consecutive to the fifteen-years-to-life sentence violated section 654; (3) the trial court failed to state reasons for sentencing defendant consecutively; and (4) the trial court's sentencing scheme denied defendant his

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[1] Penal Code section 261, subdivision (a)(2). All further statutory references will be to the Penal Code, unless otherwise noted.

[2] Section 273.5, subdivision (a).

[3] Section 422.

[4] Section 236.

[5] Section 451, subdivision (d).

[6] Section 594, subdivision (a).

[7] Sections 12022.3(a) and 667.61, subdivision (e)(4).

constitutional right to have the jury determine facts that increased his maximum punishment, pursuant to *Apprendi v. New Jersey*.[9] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The victim[10] and defendant lived together in a house owned by the victim. Defendant and the victim were not married, but they had a four-year-old son, Andrew, who was severely disabled. The victim's daughter, Cynthia, from another relationship, also lived with them.

On July 27, 2001, the victim discovered that defendant had a girlfriend. She went to defendant's workplace to pick up his paycheck and found a credit card application in defendant's name. She noticed that he had requested an additional card for someone named Cynthia Gonzales. The victim told defendant's boss to tell defendant that she did not want him at her house anymore. The victim took the car that defendant had apparently driven to work (a Honda Accord, which they co-owned), when she left his workplace. She went home and changed the locks on her house. The victim left the house because she was afraid that defendant could still get in the house. She was afraid that he would beat her because he beat her so many times before, and he always told her that if she left him, he would kill her.

[footnote continued from previous page]

[8] The court stated that it "skipped" count 4 and did not sentence defendant for the false imprisonment since it was a misdemeanor.

[9] *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].

[10] The victim was permitted to testify under a pseudonym at trial. This opinion will refer to her simply as "the victim."

That night, defendant called the victim on her cell phone between 20 and 25 times. Each time, the victim's home phone number came up on her caller identification display, so the victim knew that defendant had somehow gotten inside the house. He left her about 20 messages. In the messages, he told her that she had better come home, or else she "was going to pay for it." She knew that that meant she "was going to get beat" because, he beat her in the past when he told her she was "going to pay for it." Defendant also told her that if he ever went back to jail, it would be "for something good like killing [her]."

On July 29, 2001, the victim had to return to her house to get Andrew's seizure medication. She called the house to see if defendant was still there. There was no answer, so she drove with Cynthia and Andrew (the children) to the house that morning. When she arrived, she left the children in the car and went to the front door. Her keys did not work anymore, so she climbed in through the front window. As soon as she entered, she saw defendant and Cynthia Gonzales asleep on the couch. The victim was so angry that they were in her house, without her permission, that she grabbed Gonzales by the hair and hit her. Defendant woke up, jumped off the couch, and grabbed the victim by the throat. Defendant then pinned her against the wall and kicked and hit her for about five minutes. Defendant told Gonzales to leave. He then went to the victim's car, removed the children, and put them in them in a bedroom. The victim did not try to escape because she did not want to leave her children behind.

At some point, defendant punctured the tires on the victim's car and poured sugar in the gas tank. (The car she had driven to the house that morning was a Toyota Corolla, which was owned by the victim and her father.) Defendant's brother came over to bring him some pizza, and defendant told him what he had done to the victim's car and just laughed about it.

Defendant told the victim that he had burned all of her clothes, and showed her the fireplace, where there were still small pieces of clothing left. He took her to her closet and showed her that she had no clothes left, and laughed.

Defendant started going through the victim's purse. He then ordered the victim to go into their bedroom. He followed her and shut the door. He then took her wallet and checkbook out of her purse, put them inside an empty laundry basket, and set them on fire. The fire alarm sounded, so defendant grabbed a pair of his work pants and started hitting the alarm until it fell off the ceiling.

Defendant then started beating the victim again. She sat "in a little ball" on the ground, and he hit and kicked her legs, arms, and head. He called her worthless. Then defendant called Gonzales, so that Gonzales could hear the victim scream over the phone. Defendant kicked the victim in the ribs and just laughed about it. He asked Gonzales what she wanted him to do to the victim next.

The victim next remembered being on the bed. Defendant pulled a knife from underneath the bed and started stabbing the mattress around the victim's legs. He also rubbed the blade of the knife against her legs and told her he should just kill her.

The victim then found herself on her back, on the floor again. She did not remember how she got there. Defendant got on top of her and started kissing her neck and face. She was trying to get him off of her. She told him to leave her alone, and that she did not want to have anything to do with him. The knife was on the floor by the top of her head. Defendant then ripped her shirt open, ripped off her shorts and panties and proceeded to rape her. She kept asking him to stop, and kept saying, "Please don't do this to me." She then somehow got him off her of her and jumped onto the bed. She had her feet up, trying to kick him. Defendant just grabbed her legs, and then raped her again. Defendant then stopped, went to the kitchen and grabbed a beer. He took a couple of drinks, then poured the beer on top of her head and told her how worthless she was.

The victim went into the kitchen to get some aspirin, and defendant followed her. He kicked the victim until she fell on the kitchen floor and he then poured cough medicine on the victim's head. He then put Andrew's anti-seizure tablets in the sink and dissolved them.

Defendant was tired and went to rest on the couch. The victim convinced defendant to let her join the children in the bedroom, in order to comfort them. They were crying. Defendant checked on her every minute to see what they were doing. Defendant eventually fell asleep on the couch, and the victim called her mother and asked her to call the police and tell them to break down the front door. A short while later, the victim heard the sound of a helicopter. The victim looked outside and saw the police in the yard. She went into the kitchen and turned on the faucet full blast to make noise so

that defendant would not hear the helicopter, wake up, and see the police. The victim then grabbed Andrew and ran out the back door. Cynthia was afraid to go out into the yard because there was a dog out there.

The victim could not open the side gate, so the police knocked it down for her. The victim tripped and dropped Andrew. The police picked him up and gave him to the victim's mother. The victim was wearing her torn clothes. The police checked her over and then called an ambulance to take her to the hospital.

Cynthia went into the living room, and defendant woke up. She told him that the police were there to arrest him, and then she ran out the front door. After nearly two hours, defendant came out of the house and was arrested. Deputy Joseph Perea searched the house and found partially burned clothing in the fireplace, a medicine bottle on the floor, a burnt checkbook inside a laundry basket, soiled sheets in the bedroom, several punctures in the mattress, and a large knife underneath the bed.

Detective Edward Finneran interviewed the victim at the hospital. He testified at trial that at the hospital the victim was hysterical, her clothing was torn, her hair was matted with cough medicine, and she had several bruises, scratches, and cuts on her.

The nurse who examined the victim at the hospital testified that the victim had significant bruising and swelling on her back, shoulder, on the upper and lower part of her left arm, and on the lower part of her right arm. She also had some bruises and scrapes on her legs.

Detective Finneran also interviewed defendant at the sheriff's station. Defendant admitted to burning the victim's clothes, hitting and kicking her, burning her checkbook, puncturing her tires, pouring sugar in her gas tank, and ripping her clothes off. He also admitted having a knife and punching a hole in the bed. Defendant stated that the victim did not want to have sex at first, but then said okay, if defendant agreed that he would leave her alone afterward. Defendant admitted that what he did was wrong.

ANALYSIS

I. The Trial Court Properly Allowed Photographs of the Victim's Injuries to Be Shown to the Jury Throughout the Trial

Defendant argues that the trial court abused its discretion and denied defendant a fair trial by allowing cumulative evidence of the victim's injuries to be shown to the jury. The prosecutor showed the jury 46 photographs of the victim's injuries throughout the trial, in addition to having the victim and the examining nurse testify about the injuries and admitting evidence of defendant's confession that he caused the injuries. Defendant claims that the prosecution "overemphasized" the photographs "through multiple presentations" (i.e., during the opening and closing arguments and twice during the trial.) We find no abuse of discretion.

A. Standard of Review

Defendant contends that the trial court's admission of the photographs constituted prejudicial error. "The evidentiary principle is well established that when relevant evidence is sought to be introduced and an Evidence Code section 352 objection is made

that the prejudicial character of such evidence substantially outweighs its probative value, the trial court must exercise its discretion in assessing the objection. [Citation.]"[11]

B. There Was No Abuse of Discretion; Furthermore, Any Error Was Harmless

As conceded by defendant, the photographs at issue were not gruesome. His only complaint is that the presentation of the photographs was "unduly repetitive and cumulative." We agree with the People that the photographs were necessary to prove the elements of the charged offenses, since defendant pled not guilty to all of the charges. For example, for the rape charge, the prosecution was required to prove the act of intercourse was against the victim's will and that the act was accomplished by means of force, violence, duress or menace. Because the defense to the rape charge was consent, the photographs allowed the jury to determine whether the injuries shown in the photographs depicted physical force used to accomplish the rape.

Furthermore, for the corporal injury charge, the prosecution was required to show that defendant willfully inflicted corporal injury, resulting in a traumatic condition. A "traumatic condition" was defined as "a condition of the body such as a wound or external or internal injury . . . caused by a physical force." Thus, the photographs were necessary to show the victim's traumatic condition.

The photographs were undisputedly probative, and it is unlikely that their probative value was *substantially* outweighed by any alleged prejudice. Given the testimonies of the victim and the examining nurse, we cannot see how the photographs,

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[11] *People v. Willis* (1980) 104 Cal.App.3d 433, 451; Evidence Code section 352.

which simply depicted the injuries they described, were prejudicial. Moreover, any conceivable error in showing the jury the photographs more than once was harmless, in view of the strength of the evidence of defendant's guilt -- particularly, defendant's confession to Detective Finneran. Thus, we cannot say that, had the photographs not been shown to the jury several times, a result more favorable to him would have been obtained.[12] We hold, therefore, that any error in showing the photographs again was nonprejudicial and did not deprive defendant of a fair trial.

II. Section 654 Did Not Bar the Imposition of Separate Sentences For Each Conviction

Defendant claims that the imposition of consecutive sentences for the corporal injury to a cohabitant, criminal threats, arson, and vandalism convictions was barred by section 654 because the crimes "were part of a single, indivisible transaction culminating in the rape." We disagree.

A. Section 654 and the Standard of Review

Section 654, subdivision (a), provides in pertinent part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "'Section 654 precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. "Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor." [Citations.] "[I]f all the offenses were merely

[12] *People v. Watson* (1956) 46 Cal.2d 818, 836.

incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." [Citation.]' [Citation.]"[13]

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. "'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" [Citation.]' [Citation.]"[14]

B. Each of Defendant's Convictions Was Based on a Separate Act Involving a Distinct Objective

The key inquiry here is whether defendant's objectives and intents in inflicting corporal injury, making criminal threats, committing arson, and committing vandalism, were the same, thus making the crime one indivisible transaction subject only to one punishment under section 654. Defendant appears to assert two different intents and objectives in his opening brief. He first asserts that the crimes "were part of a single, indivisible transaction culminating in the rape." Thus, his objective in committing all the crimes was to rape the victim. Then he asserts that "the crimes arose from a single period

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[13] *People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.

[14] *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.

of aberrant behavior aimed at terrorizing and humiliating the victim." Thus, defendant's own argument defeats his claim that he only had one objective in committing the four crimes.

Defendant's first argument, that the four crimes of inflicting corporal injury, criminal threats, arson, and vandalism were "one indivisible transaction culminating in the rape," is meritless. Defendant's objective in inflicting corporal injury on the victim was to inflict physical pain. Defendant told Detective Finneran that he hit, kicked, and choked the victim because she "made him do it," because she called him a liar, and because she did not want to listen to him. Thus, it appears that he was simply angry at her and wanted to inflict pain on her.

Defendant's intent in threatening the victim was to cause her to suffer emotional distress, apart from his intent to rape her. He essentially threatened to beat her, in his phone messages to her, which he had left two days *before* she went back to the house, and, thus, two days before he raped her. Moreover, he threatened to beat her, not to rape her. He also threatened to kill her. The victim testified that defendant "had always told [her] that if [she] left him, he would kill [her.]" In view of the content of his threats and the timing of them, this crime clearly was divisible from the rape.

Defendant's objective in committing the arson was to damage the victim's clothing, wallet, and checkbook. Defendant had burned the victim's clothes *before* the morning she came to the house. Moreover, defendant told Detective Finneran that he burned her clothes because the victim had taken his paycheck and his car, and because he

could not get to work. Defendant also told Detective Finneran that he burned her checkbook because he was mad and told her he wanted his money back.

As to the vandalism, defendant punctured the tires on the victim's car and poured sugar in the gas tank. He told Detective Finneran that, since he no longer had a car to get around, he felt that she also should not have a car to drive. Defendant's objective was to ruin the car.

Thus, looking at the completely different natures of each crime and the distinct objectives and results of each, we conclude that these were all separate crimes. They were not the means of accomplishing or facilitating one objective, and we, therefore, cannot find that defendant only had the single intent of raping the victim.

Defendant also asserts that "the crimes arose from a single period of aberrant behavior aimed at terrorizing and humiliating" the victim. However, "[s]uch an intent and objective is much too broad and amorphous to determine the applicability of section 654."[15] The assertion of a sole intent and objective to terrorize and humiliate the victim "is akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts. To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability. [Citation.]"[16]

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[15] *People v. Perez* (1979) 23 Cal.3d 545, 552.

[16] *People v. Perez*, *supra*, 23 Cal.3d 545, 552.

Therefore, viewing the evidence in a light most favorable to the respondent and presuming in support of the sentencing order the existence of every fact the trier could reasonably deduce from the evidence,[17] we conclude that defendant was properly sentenced. Section 654 did not bar the imposition of separate prison terms for the crimes of inflicting corporal injury, making criminal threats, committing arson, and vandalizing the victim's car.

III. The Trial Court's Failure to State its Reasons for Imposing Consecutive Sentences was Harmless Error

Defendant claims that, because the court failed to articulate its reasons for imposing consecutive sentences, the matter should be remanded for resentencing. We disagree.

"The decision to impose consecutive sentences is . . . a 'sentence choice' for which, under the determinate sentencing law, the trial court must give reasons. [Citations.]"[18] Thus, here the trial court erred in not giving reasons for imposing consecutive sentences.

However, any error was harmless. "The appropriate harmless error test under these circumstances is: Is there a reasonable possibility that a statement of reasons would have altered the trial judge's conclusion or revealed reversible error? [Citation.]"[19]

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[17] *People v. Hutchins, supra,* 90 Cal.App.4th 1308, 1312-1313.
[18] *People v. Champion* (1995) 9 Cal.4th 879, 934.
[19] *People v. May* (1990) 221 Cal.App.3d 836, 839.

From our review of the record, we see no likelihood that requiring the trial court to state reasons for the consecutive sentence would have resulted in a different sentence.

In *People v. Champion*, the California Supreme Court found that the trial court had "erred in not giving reasons for imposing consecutive sentences."[20] However, the Supreme Court found that the error was harmless, and therefore, there was no need to remand the case for resentencing. Specifically, the Supreme Court stated: "As the trial court pointed out when it selected the upper term of imprisonment for the principal term, [the defendant's] probation report noted 10 circumstances in aggravation applicable to defendant [], and no circumstances in mitigation. *It is inconceivable that the trial court would impose a different sentence if we were to remand for resentencing*. Accordingly, we find the trial court's failure to state reasons for imposing consecutive sentences to be harmless. [Citations.]"[21]

Similarly, here, the probation report noted eight circumstances in aggravation and no circumstances in mitigation. Thus, it is exceedingly unlikely that the trial court would impose a different sentence if we were to remand for resentencing. Defendant contends that the court "failed to consider any valid reasons for its choice to sentence consecutively," and that "at least a reasonable possibility exists the court would not make the same choice if it considered the criteria listed in [California Rules of Court], rule 425." Contrary to defendant's contention, it appears that the court did consider the

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[20] *People v. Champion*, *supra*, 9 Cal.4th 879, 934.

[21] *People v. Champion*, *supra*, 9 Cal.4th 879, 934, italics added, footnote omitted.

criteria in rule 425. The trial court referred to the probation report when it stated the factors in aggravation before sentencing defendant. Therefore, we assume that the trial court reviewed the probation report. The probation report specifically listed the criteria affecting consecutive sentencing from rule 425 as: (1) "The crimes and their objectives were predominantly independent of each other"; and (2) "The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." Thus, it appears that the trial court did consider the proper criteria in making its decision to sentence defendant consecutively, although the court failed to actually state those reasons on the record.

Therefore, there is no reasonable possibility "a statement of reasons would have altered the trial judge's conclusion."[22] In other words, there is no likelihood that the trial court would impose a different sentence if we were to remand for resentencing.

IV. The Rule in *Apprendi v. New Jersey*[23] Does Not Apply

Defendant contends that he had a constitutional right, under the *Apprendi* rule, to have the jury determine whether he "harbored multiple objectives during the course of his crimes" against the victim, for purposes of section 654. We reject this claim.

The court in *Apprendi* articulated the following rule: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [for the particular crime] must be submitted to a jury, and proved

[22] *People v. May*, *supra*, 221 Cal.App.3d 836, 839.

beyond a reasonable doubt.' [Citation.]"[24] Defendant argues that the trial court's determination under section 654 that he had separate objectives with respect to his multiple crimes, violated the *Apprendi* rule. He asserts that a jury, rather than the trial court, must determine the intent and objective of a defendant under the standard of beyond a reasonable doubt, since that determination allegedly increases a defendant's maximum punishment, under section 654.

The court in *People v. Cleveland* rejected this very claim: "[S]ection 654 is not a sentencing 'enhancement.' On the contrary, it is a sentencing 'reduction' statute. Section 654 is not a mandate of constitutional law. Instead, it is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes. Thus, when section 654 is found to apply, it effectively 'reduces' the total sentence otherwise authorized by the jury's verdict. The rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury's verdict."[25]

Here, every factual element of the crimes charged was submitted to the jury, and the jury found defendant guilty beyond a reasonable doubt of each of the crimes. Thus, the jury's verdict authorized the sentences defendant received for each crime. "[I]n

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[footnote continued from previous page]

[23] *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].

[24] *People v. Cleveland* (2001) 87 Cal.App.4th 263, 269 .

finding section 654 did not apply, [defendant] received the same sentence as he was exposed to by the jury's verdict. Where, as here, the nonjury factual determination allows for a sentence within the range already authorized by the verdict, *Apprendi* has no effect."[26]

Although defendant recognizes that his claim was rejected in *Cleveland*, he asks us to follow the dissenting portion of Justice Johnson's concurring and dissenting opinion. However, we agree with the reasoning of the majority opinion.

DISPOSITION

The judgment is affirmed.

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/s/ Ward
Acting P.J.

We concur:

/s/ Gaut
J.

/s/ King
J.

[footnote continued from previous page]

[25] *People v. Cleveland*, *supra*, 87 Cal.App.4th 263, 270, italics in original.

[26] *People v. Cleveland*, *supra*, 87 Cal.App.4th 263, 270, italics omitted.